IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DYSON TECHNOLOGY LIMITED and DYSON, INC., Plaintiffs, v. MAYTAG CORPORATION, Defendant.	)	C.A. No. 05-434-GMS **REDACTED – PUBLIC VERSION**

PLAINTIFFS' ANSWERING BRIEF IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* TO BAR EVIDENCE RELATING TO HOOVER ADVERTISING AND SUBSTANTIATION

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I. SUMMARY OF THE ARGUMENT

Maytag Corporation's ("Maytag") motion in limine to exclude evidence relating to the advertising and substantiation of its then-subsidiary Hoover is a stealth motion for summary judgment filed in the face of a Court order – that no summary judgment motions would be filed in this case. [redacted]

A recent district court decision within this Circuit makes clear that a Lanham Act plaintiff's advertising and claim substantiation is not only vitally relevant to prove the defendant's affirmative defenses, but also "on the issues of damages, impeachment of witnesses, and marketing and advertising practices [in the] industry." *Merisant Co. v. McNeil Nutritionals, LLC,* No. 04-5504, 2007 WL 707359 at *25 (E.D. Pa. Mar. 3, 2007).

Maytag argues that the Court should simply issue a blanket order of inadmissibility based on a discovery ruling made months ago. [redacted] Indeed, Maytag's motion would preclude Dyson from using at trial documents and testimony that Maytag *has already voluntarily*

produced both before and after the Court's discovery ruling. Maytag's broad attempt to avoid accountability for its inequitable conduct should be rejected.

Maytag's advertising is critically relevant to this case. [redacted]

Moreover, Hoover's claims substantiation practices are relevant, powerful admissions that similar substantiation practices by Dyson are reliable. [redacted] Thus, since the Court's ruling, Maytag has squarely placed Hoover's substantiation practices in issue.

II. ARGUMENT

A. Hoover's Advertising Is Relevant and Admissible to Prove Dyson's Patent Case and Affirmative Defenses

Maytag's advertising claims for Hoover products and substantiation for such claims establish that Maytag's Lanham Act claims are barred [redacted]

[redacted][1] Moreover, a plaintiff's claims are barred by laches when it delays filing suit in order to engage in the very same conduct that is later the subject of its suit. *See, e.g., Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 824 (7th Cir. 1999) (laches applied where plaintiff marketed product with same misleading claim prior to suing).

[redacted]

[1] *See, e.g., Haagen-Dazs, Inc. v. Frusen Gladje Ltd.*, 493 F. Supp. 73, 75-76 (S.D.N.Y. 1980) (barring plaintiff's claim that defendant's advertising deceived customers into believing it was of Scandinavian origin because plaintiff did the same thing); *Emco, Inc. v. Obst*, No. CV03-6432-R, 2004 WL 1737355 at *5 (C.D. Cal. July 29, 2004) (barring Lanham Act claim where plaintiff was guilty of same conduct complained of); *see also Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 709 (M.D. Pa. 2006).

[redacted]

[redacted] *See Ciba-Ceigy Corp. v. Bolar Pharm. Co.*, 747 F.2d 844, 855 (3d Cir. 1984); *Emco, Inc. v. Obst*, No. CV03-6432-R, 2004 WL 1737355 at *5 (C.D. Cal. July 29, 2004); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 193 (2d Cir. 1996); *Merisant,* 2007 WL 707359 at *11, 12, 19-25.

No court has held, as Maytag suggests, that a Lanham Act plaintiff's advertising is irrelevant. In the lone case cited by Maytag, *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir. 2001), the court did not rule the evidence *inadmissible,* but instead admitted and considered evidence of the plaintiff's advertising. The court simply held that the evidence was not sufficient to bar a preliminary injunction. *Id.* at 174. *Highmark*, like numerous cases, stands for the proposition that a plaintiff's advertising is relevant to affirmative defenses (whether or not the defenses ultimately prevail).[3] Accordingly, Hoover's advertising is relevant and Maytag's motion should be denied.

B. Hoover's Advertising Substantiation Practices Are Relevant and Admissible

[redacted]

[3] *See, e.g., Ciba-Ceigy Corp.*, 747 F.2d at 855; *Diamond Triumph*, 441 F. Supp. 2d at 709; *Emco,* 2004 WL 1737355 at *5; *Pharmacia Corp. v. GlaxoSmithKline Consumer Healthcare, L.P.*, 292 F. Supp. 2d 594, 610 (D.N.J. 2003); *Haagen-Dazs,* 493 F. Supp. at 75-76.

[redacted]

See, e.g., Merisant, 2007 WL 707359 at * 25; [redacted] *See Compaq Computer Corp. v. Packard Bell Elec., Inc.,* 163 F. R. D. 329, 336 (N.D. Cal. 1995); *see also Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993).

III. CONCLUSION

For the reasons stated above, Maytag's motion to exclude evidence relating to Hoover advertising and substantiation should be denied.

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CERTIFICATE OF SERVICE

I, Monté T. Squire, hereby certify that on April 30, 2007, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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